

In The
Supreme Court of the United States

GENERAL CONSTRUCTION COMPANY and
LIBERTY NORTHWEST INSURANCE CORP.,

Petitioners,

v.

ROBERT CASTRO and DIRECTOR, OFFICE OF
WORKERS' COMPENSATION PROGRAMS,
UNITED STATES DEPARTMENT OF LABOR,

Respondents.

**On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit**

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Section 10(a) of the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. § 910(a), applies only if an injured employee worked "during substantially the whole of the year immediately preceding his injury," but Congress did not define "substantially." In deciding whether section 10(a) applies in a particular case, should an administrative law judge (ALJ) be required as a matter of law to follow a judicially created "bright-line 75% rule" or should the ALJ have the flexibility to decide each case on its particular facts?

2. Is an injured employee entitled to total disability benefits under the LHWCA during a period of vocational retraining when the employee would otherwise be limited to recovery under the schedule in section 8(c), 33 U.S.C. § 908(c)?

LIST OF PARTIES AND RULE 29.6 STATEMENT

All parties to the proceeding are listed in the caption of the case.

Petitioner General Construction Company's parent corporation is Kiewit Construction Group Inc., which has as its parent corporation Peter Kiewit Sons', Inc. Neither Kiewit Construction Group Inc. nor Peter Kiewit Sons', Inc. is a publicly traded company. No publicly held company owns 10 percent or more of the stock of General Construction Company.

Petitioner Liberty Northwest Insurance Corporation's parent corporation is Liberty Mutual Insurance Corporation. No publicly held company owns 10 percent or more of the stock of Liberty Northwest Insurance Corporation.

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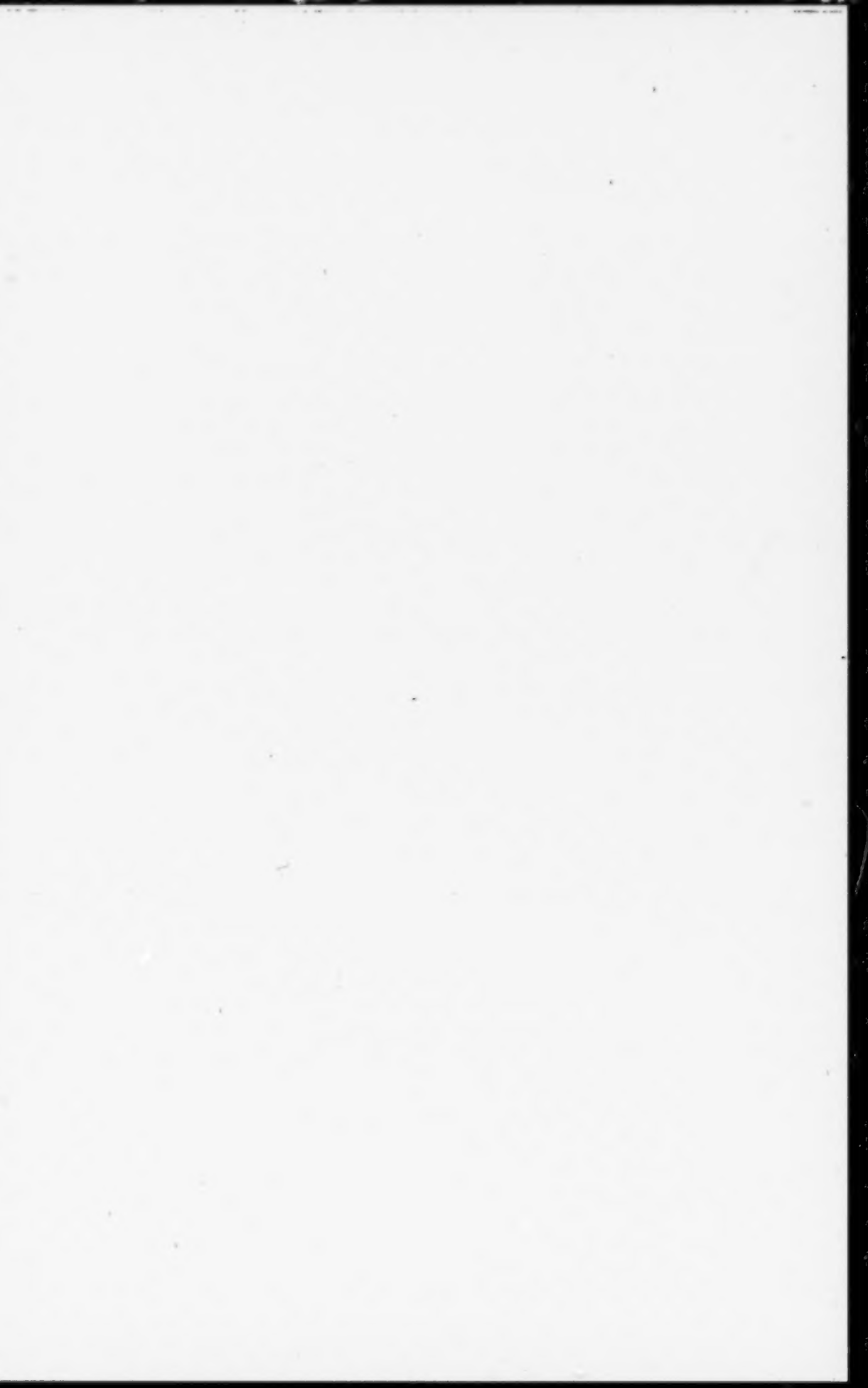
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PETITION FOR WRIT OF CERTIORARI

General Construction Company and Liberty Northwest Insurance Corp. respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the court of appeals is reported at 401 F.3d 963 (9th Cir. 2005) and reprinted in the Appendix to this Petition ("App.") at 1. The unreported order of the court of appeals denying petitioners' petition for rehearing en banc is reprinted at App. 89.

The decision of the Benefits Review Board is reported at 37 Ben. Rev. Bd. Serv. 65 (2003) and reprinted at App. 32.

The decision of the Administrative Law Judge ("ALJ") is reported at 36 Ben. Rev. Bd. Serv. 407 (ALJ) (2002) and reprinted at App. 63.

JURISDICTION

The Ninth Circuit entered judgment on March 2, 2005 (App. 1) and denied a timely petition rehearing on May 20, 2005 (App. 89). On July 21, 2005, Justice O'Connor granted an extension of time to submit a petition for certiorari until September 17, 2005. Docket No. 05A70. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY AND REGULATORY PROVISIONS

Section 8(c)(1)-(20) of the LHWCA, 33 U.S.C. § 908(c)(1)-(20), is reprinted at App. 91-93.

Section 8(c)(21) of the LHWCA, 33 U.S.C. § 908(c)(21), is reprinted at App. 94.

Section 8(h) of the LHWCA, 33 U.S.C. § 908(h) is reprinted at App. 95.

Section 10(a) of the LHWCA, 33 U.S.C. § 910(a), is reprinted at App. 96.

Section 10(c) of the LHWCA, 33 U.S.C. § 910(c), is reprinted at App. 96.

20 C.F.R. § 701.301(7) is reprinted at App. 97.

STATEMENT OF THE CASE

This case presents two important questions of federal law concerning the benefits that an injured employee may recover under the Longshore and Harbor Workers' Compensation Act ("LHWCA" or the "Act"), 33 U.S.C. §§ 901-50. First, the Ninth Circuit, in acknowledged conflict with another court of appeals, has invented a self-described "bright-line 75% rule," App. 27, to determine whether an injured employee worked "during substantially the whole of the year immediately preceding his injury" in order to trigger the application of LHWCA § 10(a), 33 U.S.C. § 910(a) (App. 96). More specifically, the Ninth Circuit has declared that any injured employee who worked more than 75% of the available work days during the preceding year is entitled, as a matter of law, to the benefit of section

10(a). This results in admitted over-compensation in virtually every case, including almost 30% over-compensation in this case.

Second, the Ninth Circuit has attempted to evade this Court's decision in *Potomac Electric Power Co. v. Director, OWCP (PEPCO)*, 449 U.S. 268 (1980), by holding that a worker with a scheduled permanent partial disability is nevertheless entitled to compensation beyond the scheduled amount because the worker is engaged in vocational retraining. Although the *PEPCO* Court held that a worker with a scheduled permanent partial disability is entitled to recover only the amount Congress authorized in LHWCA § 8(c), 33 U.S.C. § 908(c) (App. 91-93), the court of appeals held that such a worker engaged in vocational retraining should be characterized as having a permanent total disability – despite his admitted ability to return to work – in order to qualify for more generous compensation.

The LHWCA represents a statutory compromise under which injured maritime workers obtain prompt and certain compensation from their employers without proof of fault. Employers, in turn, are protected from the higher damage awards that might be available in a common-law tort action. See, e.g., *PEPCO*, 449 U.S. at 281. By creating two rules admittedly designed to provide workers with higher compensation, the Ninth Circuit has undermined the careful compromise that Congress enacted. This Court should grant review to resolve the conflict among the circuits, restore the balance that Congress intended, and protect the legitimate interests of both workers and employers.

Statutory Background

Under the LHWCA, "disability" is an economic concept based upon a medical foundation. The Act defines disability as an "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment." LHWCA § 2(10), 33 U.S.C. § 902(10). In considering the type of benefits that an injured employee receives, the Act recognizes four classifications of disability in which "temporary" and "permanent" concern the length and nature of the disability while "total" and "partial" concern the degree of disability:

- Temporary Total: an injured employee is unable to perform any gainful employment, but is expected to recover and return to full employment;
- Temporary Partial: an injured employee has a partial loss of earning power, but is expected to recover and return to full employment;
- Permanent Total: an injured employee is unable to perform any gainful employment and has reached full medical recovery;
- Permanent Partial: an injured employee has reached full medical recovery, but retains some residual wage-earning capacity.

LHWCA § 8(a)-(c), (e), 33 U.S.C. §§ 908(a)-(c), (e). *See also infra* at 13.

For certain specified injuries (known as "scheduled injuries"), the Act provides a schedule to calculate the compensation payable to an injured employee for a permanent partial disability. The loss of a leg, for example,

entitles a worker to 288 weeks' compensation (calculated as two-thirds of the worker's average weekly wages). See LHWCA § 8(c)(2), 33 U.S.C. § 908(c)(2) (App. 91). For a partial loss of use of a leg, the injured worker may recover a proportionate share of this amount. Thus for a 17% leg disability, as in the present case, the worker may claim a 48.96-week award.¹

For a permanent partial disability not falling under the schedule, such as a spinal injury, the Act provides a formula for calculating benefits. See LHWCA § 8(c)(21), 33 U.S.C. § 908(c)(21) (App. 94). The compensation for non-scheduled injuries consists of weekly payments based on the employee's loss of wage-earning capacity for as long as the loss continues. See also *infra* at 14. Several factors are considered in computing the loss of wage-earning capacity. See LHWCA § 8(h), 33 U.S.C. § 908(h) (App. 95).

The baseline for establishing the amount or rate of disability compensation, whether temporary or permanent, total or partial, is the employee's pre-injury "average weekly wage." Section 10 of the Act provides three alternative methods for calculating a claimant's earning capacity. LHWCA § 10(a)-(c), 33 U.S.C. § 910(a)-(c). Under paragraph (a), which applies only if an injured employee worked "during substantially the whole of the year immediately preceding his injury," the employee's "average daily wage or salary" on days actually worked is essentially multiplied by the number of work days in a week to yield an "average weekly wage." For an employee who typically works every day, of course, the section 10(a) "average weekly wage" is equivalent to actual earnings. If an

¹ 17% of 288 weeks = 48.96 weeks